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NOTES

Deferred Compensation—The Phantom Stock Plan Materializes

During the past few years a new incentive compensation plan has arrived on the corporate scene to take its place alongside the more familiar pension plans, bonuses, and stock options. This newcomer, the unit plan, otherwise known as the "phantom stock" plan, has had few encounters with the courts to date, but the results of these skirmishes have been markedly different.

The purposes of this note are: to explain the mechanics of the unit plan, to point out its consequences, and to discuss the issue of its validity.

MECHANICS OF THE PLAN

There are many variations of the unit plan, but typically it operates as follows.¹ An administrative committee of directors, themselves ineligible to participate in the plan, is created to award the units of the plan to various key executives and employees. Each unit is assigned a "base value" equivalent to the then current market value of one share of the corporation's common stock. The plan places limits upon the number of units which may be outstanding at any one time and the number which may be assigned to any one individual. The number of a participant's units are adjusted for stock dividends, stock splits, and other changes in the corporate capital structure.

One feature of the plan is called the "dividend credit" provision. Each assigned unit is credited with an amount equal to dividends paid on one share of the corporation's common stock during the period commencing with the participation of the particular employee and ending with the termination of his employment.² To qualify the participants for compensation, termination of employment must be by death, retirement at age 65, or retirement because of disability.

The other feature of the plan is the "market appreciation" provision. In addition to the dividend credit, each unit is further credited with a market appreciation item measured by the difference between its base

1. This description is based upon the unit plan of the Koppers Company. See *Lieberman v. Becker*, 155 A.2d 596 (Del. 1959). For a complete draft of the plan, see RABKIN AND JOHNSON, 5 CURRENT LEGAL FORMS 784 (1958).

2. Under the unit plan of some corporations, the unit-holder has three choices as to how he will receive his dividend credits. He may elect at the outset: (1) to have them accumulated to his credit, (2) to have them paid directly to him, or (3) to have one-half paid directly to him and one-half credited to his account. See *Berkwitz v. Humphrey*, 163 F. Supp. 78, 84 (N.D. Ohio 1958).

value on the day it was assigned and the market price of the stock on the day of death or retirement.³ However, to protect the unit-holder against a temporarily depressed market value, it is provided that he or his beneficiary may elect to fix the terminating market price as of any date within three years after the date of death or retirement. But in no case may the market price on the selected value date exceed the highest market price of the stock between the date of assignment of the unit and the date of death or retirement.⁴

Upon death or retirement, the total amount of deferred compensation payable to the unit-holder or his beneficiary consists of the total of the dividend credits and the market appreciation credited to his units. Such deferred compensation then becomes payable over a period of ten years, in quarterly installments.

In order to participate in the plan, an employee is required to agree to remain in the corporation's employ for a period of five years, or until retirement, to hold himself available for consultation for an additional ten years after retirement, and not to compete with the corporation or to become an employee of a competitor.⁵

As the assigned units are extinguished by death or retirement of the unit-holders, comparable units then become available for reassignment to other employees.

The board of directors sets aside a block of shares of the corporation's unissued common stock as a reserve to support the plan, and for subsequent issue and sale if and when it becomes desirable to provide funds to pay benefits under the plan.

The board of directors reserves the right to terminate the plan at any time, and if the board elects to terminate within five years from its effective date, no credit under the market appreciation provision is made to the account of any participant. Furthermore, the administrative committee can at any time prior to a participant's termination date reduce or cancel all units standing to the credit of the participant, but cannot, by so doing, affect the dividend credits already accrued.⁶

CONSEQUENCES OF THE PLAN

The unit plan is beneficial, both to the corporation and to the unit-holder, in several respects.

3. In a closely-held corporation, the stock of which has no readily ascertainable market value, the plan may be based upon increase in book value. See notes 56-58 *infra* and accompanying text.

4. Under the plan of the Pittsburgh-Consolidation Coal Company, the optional-valuation provision provided that the unit-holder could choose the retirement date or any date within two years thereafter, provided that he notified the company at least ten days in advance of the date selected. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 87 (N.D. Ohio 1958).

5. These promises provide for the consideration passing to the corporation. See note 26 *infra*.

6. *Lieberman v. Becker*, 155 A.2d 596, 600 (Del. 1959).

The plan gives the unit-holder a personal interest in the company similar to that provided by stock ownership. It is apparent that the unit plan bears a strong resemblance to the ordinary stock option plan. The profits under a stock option plan and the amount of retirement benefits under the phantom stock plan both depend largely upon the appreciation of the market value of the stock. Therefore, both plans give the executive an incentive to do his best to help maximize profits and thus increase the value of the stock.

However, the unit plan provides this ownership incentive with no necessity of a capital outlay on the part of the unit-holder. This factor makes the plan especially attractive to younger employees, who may be financially unable to make an investment in the company's stock. Through the unit plan, they have an opportunity for financial gain without an investment.

The plan is advantageous to the executive in another way — as a method of hedging against inflation. In an inflationary economy, retirement benefits determined by prior income represent a decreased purchasing power. However, since there is some correlation between stock prices and the cost of living,⁷ the unit plan may have a built-in adjustment to the current cost of living, if the corporation's stock keeps pace with the market.

Of advantage to the company is the fact that, whereas the executive holding stock purchased under an option may sell his stock at any time and realize his profit, a unit-holder must wait until retirement to realize the benefit of any market appreciation. While a stock option plan exhausts its incentive force once the stock has been sold, the unit plan provides incentive for the unit-holder until the day of his retirement.

The unit plan is particularly advantageous to a small, growth corporation, for it provides a method for such a company to defer a part of the cost of hiring managerial talent until the corporation is in a stronger financial position. Under the unit plan, unlike stock option plans that involve early payment of dividends, the corporation retains the money until the employee dies or retires, and pays no interest on it in the meantime.

To the shareholders, the phantom stock plan provides another advantage over the stock option plan — they may avoid having their interests diluted by the issuance of additional shares. If the corporation has sufficient working capital at the time it is necessary to pay the death or retirement benefits, it may pay them out of the cash then available. On the other hand, if the company is short of cash, it can sell some of the unissued stock reserved for this contingency.

7. 1 P-H CORP. SERV. § 25,048 (1957).

TAX ASPECTS OF THE PLAN

From a tax standpoint, the phantom stock plan is not as advantageous either to the corporation or to the executive as the qualified pension plan, under which the employer may take an immediate deduction for contributions and the employee is not currently taxed, but a qualified plan requires a broad base of employees and no discrimination in favor of key employees.⁸ However, for tax purposes, the phantom stock plan provides advantages over the nonqualified pension plan. If the rights under a nonqualified plan are forfeitable, the employee is not currently taxed, but the corporation may never take a deduction.⁹ If the rights are non-forfeitable, the corporation may take a current deduction, but the executive is presently taxed on the contributions.¹⁰

The income tax consequences of the phantom stock plan appear to be the same as those of other unfunded deferred compensation plans. This means that the employee is not taxed until receipt of the payments, unless he can be taxed under the doctrines of constructive receipt or economic benefit.¹¹ Therefore, there is no income to be reported at the time when contingent credits are made to the account of a unit-holder.¹² Since taxation occurs only upon receipt of the payments, the taxable income to the unit-holder will be postponed until a time when he will probably be in a lower tax bracket.

Correspondingly, the corporation obtains a deduction in the year of payment.¹³ The award of units merely creates a contingent liability to make future payments. Since, at the outset, both the fact and the amount of the liability are uncertain, no accrual can be made at that time. As dividends are credited to unit-holders' accounts, ascertainable liabilities may accrue, but no deduction can be taken for income tax purposes until payment is made.¹⁴

Since the payments to the unit-holder are income to him, it would follow that they constitute income in respect of a decedent if received by the beneficiaries or the estate of a deceased employee.¹⁵

VALIDITY OF THE PLAN

The unit plan has been before the courts twice. In both cases shareholders brought derivative actions to enjoin operation of the plan, con-

8. INT. REV. CODE OF 1954, § 401.

9. INT. REV. CODE OF 1954, § 404(a).

10. INT. REV. CODE OF 1954, §§ 403(b), 404(a)(5).

11. See *Commissioner v. Oates*, 207 F.2d 711 (7th Cir. 1953).

12. See Fillman, *Ford Motor Company Employee Benefit Plans*, N.Y.U. 17TH INST. ON FED. TAX 883, 902-03 (1959).

13. INT. REV. CODE OF 1954, § 404(a)(5).

14. Sheldermine, *Shadow Stock Deferred Compensation Agreements*, N.Y.U. 17TH INST. ON FED. TAX 933, 946 (1959).

15. INT. REV. CODE OF 1954, § 691.

tending that it was a waste of corporate assets. In *Berkwitz v. Humphrey*,¹⁶ a United States district court determined that the phantom stock plan of the Pittsburgh-Consolidation Coal Company was invalid and issued an order restraining the corporation from issuing any further units under the plan. But in *Lieberman v. Becker*,¹⁷ the Supreme Court of Delaware found the unit plan of the Koppers Company to be valid, rejecting the reasoning of the *Berkwitz* case. Since the plans in question in the two cases were very similar, the variation between the decisions requires a close study of the reasoning in both, in order to guide the way for future use of the unit plan.

There are two requirements for the validity of an incentive compensation plan: (1) consideration, and (2) a reasonable relationship between the value of the services rendered and the benefits granted to the employees.¹⁸ The application of these two requirements to the unit plan will be considered in detail.

Consideration

The first requirement for validity is that consideration pass from the employee to the corporation.¹⁹ Several examples may be shown of consideration held to be sufficient to support the granting of stock options. One option was upheld upon a finding that the optionee was under an employment contract.²⁰ Another plan was upheld where the employees agreed to remain in the service of the corporation for two years from the date of the granting of the options.²¹ A third plan was upheld where one year's service was to be performed prior to the exercise of the option.²²

On the other hand, mere creation of additional incentive in the employee is not sufficient consideration.²³ In one instance, an option plan was enjoined because neither was the employee obligated to remain in the company's employ, nor was the right to exercise the option made dependent upon continued employment.²⁴ Subsequently, an amended plan requiring the optionee to remain in the company's employ for one year

16. 163 F. Supp. 78 (N.D. Ohio 1958).

17. 155 A.2d 596 (Del. 1959).

18. *Rogers v. Hill*, 289 U.S. 582 (1933); *Wyles v. Campbell*, 77 F. Supp. 343 (D. Del. 1948); *Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 283, 92 A.2d 594 (Sup. Ct. 1952).

19. *Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 283, 92 A.2d 594 (Sup. Ct. 1952).

20. *Wyles v. Campbell*, 77 F. Supp. 343 (D. Del. 1948).

21. *Kaufman v. Shoenberg*, 33 Del. Ch. 211, 91 A.2d 786 (Ch. 1952).

22. *Eliasberg v. Standard Oil Co.*, 23 N.J. Super. 431, 92 A.2d 862 (Ch. 1952).

23. See *Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 82, 90 A.2d 660 (Sup. Ct. 1952); *Frankel v. Donovan*, 120 A.2d 311 (Del. Ch. 1956).

24. *Holthusen v. Edward G. Budd Mfg. Co.*, 52 F. Supp. 125 (E. D. Pa. 1943).

and preventing exercise of the option until one year after the issuance was upheld.²⁵

The unit plan, as discussed previously, requires an agreement by the employee to remain in the corporation's employ for five years, and also other promises on his part.²⁶ Therefore, the presence of sufficient consideration seems clear, and even the court in *Berkwitz v. Humphrey*²⁷ did not dispute this.

Reasonable Relationship

The second requirement for the validity of the plan is that the value given by the corporation bear a reasonable relationship to the value to be received from the employee. Otherwise, the plan amounts to a gift of corporate assets, which even a majority of the shareholders cannot make, if the minority protests.²⁸ To determine whether the unit plan complies with this requirement, the dividend credit and market appreciation features of the plan must be examined separately.

The dividend credit feature appears to cause little difficulty here. Since dividends are related directly to earnings, they seem by nature to be reasonably related to the efforts of the executives. In both the *Berkwitz* case and the *Lieberman* case it was conceded by the plaintiffs that the income of the company, upon which dividends are ultimately based, bears a reasonable relationship to the value of the employee's services.²⁹

It is the market appreciation provision which has cast doubt upon the validity of the plan. In the *Berkwitz* case, the court had three objections to the market appreciation feature.

First, the court said that there was no reasonable correlation between the market price of the corporation's stock and the value of the unit-holders' services. It reasoned that, although earnings affect the market price, other factors totally unrelated to the value of the key executives' services also have a substantial effect. Among these other factors the court named: investor confidence, the general state of the economy, the supply of stock available, the cost of money, inflation or deflation, and the tendency of the market to discount the future.³⁰

Apparently the court felt that it could sustain the validity of the unit plan only if it could first hold "that an increase in the market value of the stock is attributable *solely* to the extraordinary services rendered

25. *Holthusen v. Edward G. Budd Mfg. Co.*, 53 F. Supp. 488 (E. D. Pa. 1943).

26. See note 5 *supra* and accompanying text.

27. 163 F. Supp. 78 (N. D. Ohio 1958).

28. *Rogers v. Hill*, 289 U.S. 582 (1933); *Wyles v. Campbell*, 77 F. Supp. 343 (D. Del. 1948).

29. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 89 (N. D. Ohio 1958); *Lieberman v. Becker*, 155 A.2d 596, 598 (Del. 1959).

30. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 90 (N. D. Ohio 1958).

by unit holders in response to the incentive of additional compensation."³¹ (Emphasis added.)

But the validity of the plan should not rest upon this postulate. Incentive compensation plans are based upon the assumption that better personnel can be induced to come and remain with a company, and that better results will ensue, if more attractive financial rewards are granted. It is true that the market value of stock of a large corporation is determined to a large extent by the broad economic trends and other factors. However, since earnings are the main factor in stock appreciation, energetic, loyal management should, over a period of years, have an appreciable impact upon the market price of a corporation's stock.

In the *Lieberman* case the court stated that fundamentally the plan is similar to an ordinary stock option plan which is clearly valid;³² consequently, the phantom stock plan should be upheld. The court pointed out that the stock option plan, "based as it is upon a rise in the stock price on the stock exchange, is equally subject to the vagaries of the market for the realization by the employee of his reward."³³ After comparing the two plans, the court stated that:

If the acid test is a demonstrable relationship, then both types of plans, we think, are subject to the same fatal flaw. On the other hand, if one is a valid exercise of corporate power, by the same token, the other is equally valid.³⁴

The second objection that the court in the *Berkwitz* case made to the plan was in regard to the "optional value" provision, allowing the employee to pick a date within two years after termination of employment to determine market appreciation. It held the provision to be unreasonable per se, saying that:

Manifestly, any payment of an award resulting from an increase in market value occurring after an employee has ceased working for the corporation would be a gift and a clear misuse of corporate funds.³⁵

But this provision seems justifiable as an attempt to compensate the employee for the continuing value of his past services to a going business and also as a method of protecting him from the vagaries of the stock market. It is similar to a provision in a stock option plan which allows exercise of the option within a limited period after termination of employment.

The third objection in the *Berkwitz* case was that the absence of any

31. *Id.* at 91.

32. See FLETCHER, CORPORATIONS § 2143.1 (Supp. 1959); DEL. CODE ANN. tit. 8, § 157 (Supp. 1958).

33. *Lieberman v. Becker*, 155 A.2d 596, 600 (Del. 1959).

34. *Ibid.*

35. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 93 (N.D. Ohio 1958).

limitation on the amount a unit-holder could receive meant that the corporation might become obligated to pay "grossly disproportionate" benefits.³⁶ This point was also raised in the *Lieberman* case but was rejected for several reasons.

One reason for rejecting the contention was that the plan in question did provide checks upon this liability. There were the reservations permitting the board of directors to terminate the plan and the administrative committee to reduce or cancel all units standing to the credit of the participant.³⁷

The court noted that a further limitation upon the liability of the company existed in the setting aside of a substantial block of unissued shares of stock, as a reserve against the company's obligation under the plan. This meant that if there were a large rise in market price, imposing an unexpected liability on the corporation to meet its obligations under the plan, the company could sell in the open market a sufficient number of such shares to satisfy the requirements of the plan.³⁸

Finally, the court commented that, even if potentially unlimited liability did exist, "such a reason would not seem to be sufficient in any event to strike down a plan of compensation at the time of its institution."³⁹ The court stated that:

... in the event matters got out of hand, the courts undoubtedly could prevent the waste of corporate assets if the actual amounts to be paid under the plan became so large as to be wholly unreasonable.⁴⁰

This type of language is in line with the "business judgment rule," whereby courts defer to the honest judgment of the directors on questions of corporate management and policy.⁴¹ In shareholder derivative suits, the courts usually require the shareholder attacking a plan to show that the excessive compensation stems from fraud or bad faith practiced by the directors.⁴² Furthermore, even the landmark case in the incentive compensation area, *Rogers v. Hill*,⁴³ held merely that the amount paid was unreasonable, not that the plan by which the figure had been computed was unreasonable.

Although the opinion in the *Berkwitz* case ignored the business judgment rule, the court in the *Lieberman* case followed that rule stating:

36. *Id.* at 91.

37. See note 6 *supra* and accompanying text.

38. *Lieberman v. Becker*, 155 A.2d 596, 600 (Del. 1959).

39. *Id.* at 601.

40. *Ibid.*

41. *Otis & Co. v. Pennsylvania R.R.*, 61 F. Supp. 905 (E.D. Pa. 1945); *Ellerman v. Chicago Junction Ry.*, 49 N.J. Eq. 217 (Ch. 1891).

42. *Heinz v. National Bank of Commerce*, 237 Fed. 942 (8th Cir. 1916); *Gottfried v. Gottfried*, 112 N.Y.S. 2d 431 (Sup. Ct. 1952).

43. 289 U.S. 582 (1933).

In any event, whether or not a corporation should embark upon such a method of compensating its employees is to be decided by the board of directors in the exercise of their business judgment.⁴⁴

Reasonableness for Tax Purposes

The preceding discussion, although dealing with the question of reasonableness as against shareholder attack on the plan, is of equal importance for income tax purposes. Since a corporation is allowed to take a deduction only for "a reasonable allowance for salaries or other compensation for personal services actually rendered,"⁴⁵ the Internal Revenue Service will inquire into the reasonableness of this type of incentive compensation.⁴⁶ The same type of analysis will be applied as in the shareholder's suit.

ADOPTION OF THE PLAN

If a corporation decides to adopt the unit plan, the question arises as to the best method for so doing. In Ohio, the board of directors is empowered to adopt a stock option plan without submitting the matter to the shareholders.⁴⁷ However, until the doubts caused by the *Berkwitz* case as to the validity of the unit plan are resolved, it is advisable for the directors to approve the plan and then have it ratified by the shareholders.

Shareholder approval will not render a gift or a waste of corporate assets valid, unless perhaps the vote is unanimous.⁴⁸ However, it has been held that, even in a waste situation, such approval creates a presumption of regularity.⁴⁹ Shareholder ratification renders a simple "interested director" transaction valid,⁵⁰ and also has the effect of shifting the burden of proof from the interested director to the attacking shareholder.⁵¹

For shareholder approval to be effective, there must be full and complete disclosure to the shareholders.⁵² In this regard, some courts may construe the requirement of notice and explanation more strictly than others.⁵³

44. *Lieberman v. Becker*, 155 A.2d 596, 601 (Del. 1959).

45. INT. REV. CODE OF 1954, § 162(a)(1).

46. See *Patton v. Commissioner*, 168 F.2d 28 (6th Cir. 1948); *Rogers Inc. v. United States*, 93 F. Supp. 1014 (Ct. Cl. 1950).

47. OHIO REV. CODE § 1701.17.

48. *Kerbs v. California Eastern Airways, Inc.*, 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952).

49. *Rogers v. Hill*, 289 U.S. 582 (1933).

50. *Chambers v. Beaver-Advance Corp.*, 392 Pa. 481, 140 A.2d 808 (1958); *Frey v. Geuder, Paeschke & Frey Co.*, 4 Wis. 2d 257, 90 N.W.2d 765 (1958).

51. *Kaufman v. Shoenberg*, 33 Del. Ch. 211, 91 A.2d 786 (Ch. 1952).

52. *Kerbs v. California Eastern Airways, Inc.*, 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952); *Gerlach v. Gillam*, 139 A.2d 591 (Del. Ch. 1958).

53. Compare *Frey v. Geuder, Paeschke & Frey Co.*, 4 Wis. 2d 257, 90 N.W.2d 765 (1958) with *Eliasberg v. Standard Oil Co.*, 23 N.J. Super. 431, 92 A.2d 862 (Ch. 1952).

In the *Berkwitz* case, the defendants contended that, even if the plan had been of questionable validity when adopted, it had been effectively ratified by the shareholders. However, the court held that there had been no ratification because the proxy statement had said that the purpose of the vote was to authorize the setting aside of shares in connection with the unit plan, and, thus, the shareholders had not approved the plan itself.⁵⁴ But in the *Lieberman* case the shareholders had expressly approved adoption of the plan.⁵⁵

The lesson is clear. All of the details of the plan should be revealed to the shareholders and they should expressly approve the plan.

ALTERNATIVE PLANS

A number of other plans exist which are similar to the type of phantom stock plan discussed previously. Because there is at least a doubt as to the validity of the market appreciation feature, in light of the *Berkwitz* decision, and because a particular corporation may find one of the alternative plans more suitable to its individual needs, it seems appropriate to discuss several of the plans briefly.

The Heinz Plan

In the *Berkwitz* case, the court mentioned that the plan in question had been patterned after a similar one adopted by the H. J. Heinz Company, but that the Heinz plan differed significantly in that the benefits were based upon increased book value of the company's shares, rather than upon appreciation in the market value. The court suggested that such a plan based upon increased book value, properly computed, would be valid.⁵⁶

Indeed, the book value plan seems clearly to avoid the objections which the court in the *Berkwitz* case found with respect to the market appreciation feature. The benefits under the book value plan must bear a reasonable relationship to services, because (1) earnings are admittedly related to the services rendered, and (2) if management withholds distribution of dividends, those earnings which are not distributed remain in the corporation as an addition to net assets, thus increasing the book value of the stock. Also, the method provides more stability, since book value is not subject to the rapid fluctuations of market value.

However, the accountant's book value may not always be an accurate indication of a corporation's true, intrinsic worth, since recognized accounting practice does not allow the writing up of assets to reflect appre-

54. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 94 (N.D. Ohio 1958).

55. *Lieberman v. Becker*, 155 A.2d 596, 597 (Del. 1959).

56. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 94 (N.D. Ohio 1958).

ciation in market value.⁵⁷ This conservatism would seem to make the plan less attractive to the employee. In the Heinz plan, great care was taken in defining book value and provision was made for adjustments to exclude unusual and non-recurring items which would not reflect the true appreciation in the value of the company.⁵⁸

Use of the book value feature provides a method for adapting the phantom stock plan to smaller, closely-held corporations, the stock of which has no readily ascertainable market value. The phantom stock plan is an especially useful incentive system for closely-held corporations, since the incentive of stock ownership can be provided to key employees without the necessity of admitting minority shareholders.

Stock Held by Corporation

Another plan provides for a bonus to be granted to the employee in the form of a number of shares of stock which are actually held by the corporation until the employee's retirement, with dividends to be paid to him in the meantime.⁵⁹ It has been argued that such a plan is superior to the phantom stock plan because the only cost to the corporation is the original value of the shares when they are awarded, as contrasted with the phantom stock plan, in which the final market appreciation benefits come from the corporation's treasury.⁶⁰

However, it seems that in fact the phantom stock plan may be less costly to the corporation than one in which actual stock is delivered, for two reasons. First, the "dividends" paid or credited to unit-holders are charged off as operating expenses when paid, and come out of gross income before taxes, not as in the case of actual dividends, out of net income after taxes. Second, when the corporation finally pays the deferred compensation, either out of its treasury or by sale of the unissued stock, it pays only the difference between the original value and the final amount.

The Du Pont Plan

The Du Pont Corporation has adopted a plan which combines the features of the unit plan and the stock option. The executive is granted a certain number of units, accompanied by stock options. Each unit entitles him to receive an amount equivalent to the dividends paid on a

57. AMERICAN ACCOUNTING ASSOCIATION, ACCOUNTING AND REPORTING STANDARDS FOR CORPORATE FINANCIAL STATEMENTS AND PRECEDING STATEMENTS AND SUPPLEMENTS 23 (1957). Cf. *Randall v. Bailey*, 288 N.Y. 280, 43 N.E.2d 43 (1942).

58. Shelmardine, *Shadow Stock Deferred Compensation Agreements*, N.Y.U. 17TH INST. ON FED. TAX 933, 947 (1959).

59. *Business Week*, May 31, 1958, p. 53.

60. *Ibid.*

share of common stock until his death or his eighty-fifth year, whichever comes later. Under this plan there is no market appreciation feature. As the accompanying options are exercised, the dividend units are reduced proportionately.⁶¹ Thus, if the executive wishes to gain the benefits of any market appreciation he must make an investment, but even if he chooses not to exercise his options he still has additional income for himself or his estate. Since there is apparently no objection either to extra compensation based upon annual dividends or to stock options, this plan, combining the two, seems clearly valid.

CONCLUSION

The phantom stock plan is a novel innovation which bears examination by corporations both large and small. Although the issue of its validity has not been clearly resolved, the indications are that the plan is valid. *Berkwitz v. Humphrey*,⁶² a lower court case, was never appealed. Its reasoning was rejected by the Supreme Court of Delaware in *Lieberman v. Becker*,⁶³ in a decision based upon sounder reasoning. The court in the prior case seemed to feel that there was a total lack of precedent to guide it, as evidenced by its statement that "diligent research by counsel and the court has failed to reveal any reported decision that is even remotely analogous on its facts."⁶⁴ However, it ignored the basic similarity between the phantom stock plan and the ordinary stock option plan, the validity of which is firmly established. Both plans are designed to meet the same objective, and the phantom stock plan may be a more effective means of obtaining the objective for some corporations. Its use should increase as the years pass.

JAMES A. AMDUR

The Abortion Law

A young pregnant housewife is told by doctors that there is a predictable chance that her child will be born physically deformed.

A grandmother with heart disease and entering "change of life" finds that she is pregnant.

A thirteen-year-old rape victim learns that she is going to have a baby.

An emotionally disturbed socialite wife threatens suicide if she is forced to go through with her first pregnancy.¹

61. Cox, *Aspects of the duPont Bonus Program*, N.Y.U. 17TH INST. ON FED. TAX 905, 913-15 (1959).

62. 163 F. Supp. 78 (N.D. Ohio 1958).

63. 155 A.2d 596 (Del. 1959).

64. *Berkwitz v. Humphrey*, 163 F. Supp. 78, 88 (N.D. Ohio 1958).

If one proceeds from the premise that each of these women desires an abortion, two questions are immediately presented: First, is abortion in such cases medically, humanely, eugenically or socially justifiable? Second, and more important, if it is assumed that the abortion can be justified on one or a combination of the above grounds, would the performance of such an abortion be legal under the existing laws?

Each of the above cases was decided by doctors on "medical" grounds. The grandmother and the socialite received abortions; the other two did not. But, in other cases, with exactly the same circumstances, the results have been the opposite. In America, decisions on abortions vary from doctor to doctor and from hospital to hospital.²

This confusion and inconsistency present in the field of "legal" abortion has resulted mainly from the status of the law on the subject, and has created problems for the prospective mother, the medical profession, and the nationwide community.

THE LAW IN THE UNITED STATES

Since there is no federal abortion law in the United States, each state has been free to legislate independently on the subject. However, no state has enacted a law defining legal abortion, and, therefore, in order to discover what abortions may be performed within the law, it is necessary to look to the exceptions provided for in the criminal abortion statutes.

The prevailing view in this country is that abortion is illegal unless necessary to preserve the life of the mother.³ There are only six jurisdictions today which provide for abortion to preserve the mother's *health*, as distinguished from saving her *life*.⁴ Therefore, the general prerequisite for lawfully performing an abortion (the expulsion or bringing forth of the fetus before it has reached such a stage of development so as to be capable of living)⁵ is that it be necessary to save the life of the mother.

It is fairly obvious that such provision is quite narrow in scope, and ignores many situations that would perhaps justify an abortion.

1. Sontheimer, *Abortion in America Today*, Woman's Home Companion, Oct. 1955, p. 44.

2. *Ibid.*

3. Louisiana is the only state which provides no basis for justifying abortion. See Morrow, *The Louisiana Criminal Code of 1942 — Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 1, 21 (1942).

4. Alabama, Colorado, District of Columbia, Maryland, New Mexico, Oregon. For a full statement of the statutory provisions of each state see Harper, *Abortion Laws in the United States*, ABORTION IN THE UNITED STATES, Appendix A (Calderone ed. 1958).

5. 1 AM. JUR. *Abortion* § 2 (1940).

ENGLISH v. AMERICAN VIEW

The leading English case of *Rex v. Bourne*⁶ shows how much further British courts have been willing to go in allowing therapeutic abortion under a "preserving life" statute. The case involved the prosecution of a doctor for aborting a fourteen-year-old rape victim. The court stated in the charge that there was no clear line of distinction between danger to life and danger to health, and that impairment of the latter might reach the stage where it was a danger to life. Therefore, the court said, the preservation of life is not to be limited to the peril of instant death; rather, if the probable consequence of the continuance of the pregnancy would be to make the girl a "physical or mental wreck," the jury could find justification for the abortion. (Mr. Bourne was acquitted.)

It appears, therefore, that in England, under the same type of statute that is prevalent in the United States, the view is that the termination of pregnancy is justified when it is carried out by a doctor in the honest belief, on reasonable grounds, that the continuance of the pregnancy will endanger the life or cause serious injury to the physical or mental health of the mother.

In the United States, the more recent leading cases on abortion show that the general tendency on the part of the courts is to interpret the abortion statutes liberally.

In *State v. Dunkelbarger*⁷ it was held that the danger which justifies abortion need not be "imminent," but is sufficient if it is "potentially present," nor is it essential that the doctor believe that the death of the patient be otherwise certain. The case involved a fifteen-year-old girl who was aborted by the defendant after the girl had used instruments on herself and had jumped several times from a height of eight or ten feet in what the court may have regarded as suicide attempts, but more likely were crude efforts at self-abortion. Since the Iowa statute read that the abortion is illegal "unless such miscarriage be necessary to save her life,"⁸ the court's decision to acquit the doctor seems to be an instance of judicial straining to accommodate excessively strict abortion law to the "spirit of the times."⁹

6. [1939] 1 K.B. 687. The case involved the rape of a fourteen-year-old girl who subsequently found herself pregnant. Mr. Bourne, a prominent English physician, aborted her and promptly invited prosecution, making this a "test case." Bourne alleged that, in his opinion, even if the girl had not died in the approaching confinement, it probably would have made her a physical and mental wreck. The jury acquitted him and in the charge by McNaughten, J., the English view was stated that life and health cannot be separated and that the law was not concerned only with instant death. See *Rex v. Bergmann & Ferguson*, Central Criminal Court (May, 1948), which held that where mental breakdowns would result if pregnancy were allowed to continue, an abortion may be performed.

7. 206 Iowa 971, 221 N.W. 592 (1928).

8. IOWA CODE § 12973 (1927) (now IOWA CODE ANN. § 701.1 (1950)).

9. Guttmacher, *The Legal Status of Therapeutic Abortion*, THERAPEUTIC ABORTION 175, 183 (Rosen ed. 1954).

Another noteworthy American case is *Commonwealth v. Wheeler*,¹⁰ where the court, while affirming the defendant physician's conviction, stated that "a physician may lawfully procure the abortion of a patient if, in good faith, he believes it necessary to save her life or to prevent serious impairment of her health, mental or physical," and if his judgment corresponds with the general opinion "of competent practitioners in the community in which he practices."¹¹

However, it is also true that many courts do not take a liberal view, but hold that the destruction of an unborn life for reasons, whatever they may be, other than the necessity to save the mother's life, is prohibited.¹² Furthermore, the general view has been that evidence of the prior good health of the woman is sufficient, in the absence of evidence of necessity, to sustain a finding of non-necessity of the abortion to preserve life.¹³

THE RESULTS OF THE UNITED STATES LAW

The Doctor's Dilemma

The repressive view that the American law has taken toward abortion has resulted in appalling consequences. As one learned medical man has stated:

When a law is such that a great profession is required, on humanitarian grounds, to repeatedly break this law, and when enforcement agencies recognize the law's inadequacy by failing to prosecute flagrant infractions thereof, then it is high time that something be done about it.¹⁴

This same author goes on to state that one must wonder about the wisdom of a law when it is frequently seen that a strict compliance with it results in the death of both the mother and the fetus, when the mother might have been saved.¹⁵

10. 315 Mass. 394, 53 N.E.2d 4 (1944), where the defendant physician, without consultation, secretly aborted his wife in his own office, because "she had suffered a neurosis for years." But see *State v. Brandenburg*, 137 N.J.L. 124, 58 A.2d 709 (Sup. Ct. 1948), affirming conviction of a licensed physician, where trial judge had declined to charge that protection of the health or well-being of the woman could constitute lawful justification. The appellate court found no substantial support for a justification based on "well-being," and refused to consider whether the statute allowed abortion to preserve health, since the defense was removal of a dead fetus to save the woman's life.

11. *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4, 6 (1944).

12. *State v. Tippie*, 89 Ohio St. 35, 105 N.E. 75 (1913) held that the Ohio statute covers any case of the premature removal or expulsion of the fetus, whether living or dead, with other intent than to preserve the mother's life. See also *State v. Rudman*, 126 Me. 177, 136 A. 817 (1927).

13. *Fitch v. Commonwealth*, 291 Ky. 748, 165 S.W.2d 558 (1942); *State v. Fitzgerald*, 174 S.W.2d 211 (Mo. 1943). Annot., 153 A.L.R. 1266 (1944).

14. Address by Roy E. Fallas, M.D., President of Pacific Coast Obstetrical and Gynecological Society, June 1952, in 60 WESTERN J. OF SURGERY, OBSTETRICS & GYNECOLOGY 259, 260 (1952).

15. *Id.* at 261.

One result of the law in its present status is the perilous and uncertain position in which it places the doctor. Although it is clear that an abortion may be legally performed if it is necessary to preserve the life of the mother, the question which the doctor must decide is: what is life for the purposes of the abortion laws? Does "life" connote the ability to continue normal physical and mental activity, or is the meaning of the word to be so construed that abortion would be illegal if performed to protect that life from existence at a vegetative level?¹⁶ The law has done little to answer this question.

The exceptions found in the statutes are of little aid to the legitimate doctor in deciding whether or not, in a given case, he may abort his patient.¹⁷ Not only are these statutes narrow in scope, but moreover, judicial interpretation of them is meager. (The latter factor stems from the lack of prosecutions for abortion in the United States and the fact that most of the prosecutions that do take place are defended on the ground of denial of the act rather than of the necessity for it.)

Physical Health

This dilemma can best be illustrated by a sample case.¹⁸ Suppose a doctor is faced with an abortion request by a twenty-two-year-old severe cardiac patient. Two years previously she had had a baby, but throughout the pregnancy she was forced to remain bedridden. Her request can be analyzed from two points of view. (1) The patient was carried safely through pregnancy two years before and there is a good likelihood that this can be done again. Even though it is true that she will be forced to remain in bed throughout virtually her entire pregnancy and will be unable to take care of her child and family, nevertheless a second child is unlikely to cause her premature death. (2) It can be argued that hers is a valuable life. She already has a two-year-old child to whom she owes motherly duties and a husband to whom she owes wifely duties. Is it fair to compel her to give these up for nine months? Furthermore, with the severe heart disease she has, her life expectancy is short and will most likely be shortened still further by the necessity of caring for two infants instead of one. It may be concluded that upon ethical grounds a hospital would be justified in either aborting or not aborting her, the decision depending upon which of the above views is taken.

This problem becomes even more acute when economic and social factors are added. Would it affect the decision if the girl lived in an old walk-up apartment and had to do all her own work, in contrast to a

16. REGAN, DOCTOR AND PATIENT AND THE LAW, 322 (3d ed. 1956).

17. *Ibid.*

18. Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 JOURNAL OF MOUNT SINAI HOSPITAL 111 (1954).

situation where she resided in a plush home with an abundance of domestic and financial help?

In theory, under the law today, the only justification for therapeutic abortion is on "medical" grounds. Therefore, in the above case, the only question to be decided would be whether an abortion is necessary to preserve this woman's life. In practice, however, few decisions on abortion are decided solely on medical grounds. This leads to two opposite results. On the one hand many doctors refuse to perform an abortion, even when they feel it justified, for fear of prosecution and because they are unsure of the protection that the law affords them.¹⁹ Many of these doctors will instead send "worthy" patients to known abortionists. In direct opposition to this (and by far the more frequent result) is the performance by doctors and hospitals of numerous "illegal" abortions. It has been stated that:

The truly legal abortions, in which the procedure is absolutely essential to preserve the woman's life are relatively few. If one should apply this yardstick, and this yardstick alone to each case, it is unlikely that more than one abortion in five hundred or one thousand pregnancies is technically legal.²⁰

In commenting on this problem, the late Dr. Frederick J. Taussig, America's foremost authority on abortion, said that:

If therapeutic abortion were limited to those cases where the life of the mother was certainly and immediately imperiled, the number of such abortions would be exceedingly small, and unfortunately they would in many instances be done too late to save her life. . . . The medical profession has, as a rule, paid but little attention to what was written in the statute books. . . .²¹

Mental Health

In recent years the importance of the psychiatric necessity for abortion has increased. However, the fear of the law has been a strong determining factor in the policy adopted by hospitals and physicians in granting abortions on psychiatric grounds.²² Since the law states that abortion can only be performed in order to save or preserve the mother's life, one widely-held view that has resulted is that the only legally valid psychiatric reason for terminating pregnancy is the danger of suicide.²³

19. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 188 (1957). (Hereinafter cited as WILLIAMS).

20. Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 JOURNAL OF MOUNT SINAI HOSPITAL 111, 119 (1954).

21. As quoted in Sontheimer, *Abortion in America Today*, Woman's Home Companion, Oct. 1955, p. 44.

22. WILLIAMS 168.

23. McGraw, *Legal Aspects of Termination of Pregnancy on Psychiatric Grounds*, 56 N.Y. ST. J. MED. 1605 (1956). But see *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891), where the court held that the defense of necessity was not available if the abortion was procured to prevent the mother from committing suicide.

However, even this narrow interpretation is replete with its problems. When a woman threatens suicide unless her pregnancy is terminated, it is difficult to segregate the factor of "illness" from such rational and social elements as her desire to avoid disgrace, or excessive childbearing, or loss of job. These latter considerations are, of course, no basis for "legal" abortion. In reality, psychiatric justifications for abortion are hard to isolate and psychiatrists themselves find it difficult, if not impossible, to distinguish between medical and social justification.²⁴ The result is that even when the psychiatrist advises an abortion, the surgeon often refuses simply because he is unsure of whether the decision was based on sound medical grounds, and thereby complies with the law.

*Should the Medical Profession Be Forced to
Pay Little Attention to the Law?*

In principle there seems to be no sound reason why the justification for abortion should not be extended to cases where the pregnancy is to be terminated for the purpose of preventing serious injury to the mother, even though that injury is not of such a character as to affect the duration of her life. The mother's life must be considered in relation to its quality as well as to its duration. Serious physical or mental injury to the mother, who is a human being capable of pain and suffering, is a great evil and should be avoided.²⁵ There is as yet little judicial guidance on the question whether the quality of the life is regarded under statutes referring merely to the preservation of the life of the mother. "It would certainly be a grave thing to hold that operations to preserve the mother's health (as distinct from life) are illegal, when these operations are already performed by the medical profession with beneficial results."²⁶ In reality, one finds that most therapeutic abortions are actually granted because of socioeconomic and humanitarian reasons that are masked as psychiatric or other medical reasons.²⁷

The problem that the law has created for doctors by allowing abortion only on "medical" grounds is further complicated by the recent advance of medicine in reducing the number of situations where abortion is necessitated by physical conditions of the mother.²⁸ In fact, the number of cases where the operation is needed to save the mother from impend-

24. Lidz, *Reflections of a Psychiatrist*, THERAPEUTIC ABORTION 277-83, (Rosen ed. 1954); ABORTION IN THE UNITED STATES ch. 7 (Calderone ed. 1958).

25. WILLIAMS 163-64.

26. *Id.* at 165.

27. ABORTION IN THE UNITED STATES 175 (Calderone ed. 1958).

28. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, THERAPEUTIC ABORTION 12 (Rosen ed. 1954).

ing death has dwindled almost to insignificance.²⁹ It is clear, therefore, that only if the physician is allowed to provide against a probable shortening of the expected span of life, and for this purpose is allowed to take into account psychological, family, and social factors, will therapeutic abortion become more useful and generally applicable.

AREAS THE LAW DISREGARDS

As the situation now stands, the legal justification for abortion fails to encompass many areas which appear to need the sanction of the law. Abortion is not justified on the ethical ground that the mother was raped or that the intercourse was obtained by threat or fraud; or on the eugenic ground that the father or mother is feeble-minded or affected with a transmissible disease; or that the pregnancy resulted from an incestuous act; or on the economic ground that the parents cannot support another child; or on the ground that the mother is unmarried and will be forced to give up her job and will be socially disgraced; or on the ground that the fetus is already dead.³⁰

However, it should be pointed out that some of these considerations may (and often do) enter indirectly by giving rise to the physician's belief that it would be injurious to the mother to allow her to give birth to the child. In particular, severe worry about the consequences of having the child may greatly affect the mother's mental health, thereby permitting the abortion.³¹

Removal of the Dead Fetus

The general view of the American courts has been to interpret the usual abortion statutes as prohibiting the removal of the dead fetus from the mother.³² The social reason for this interpretation is that it enables the lay abortionist to be convicted, because it deprives him of the defense that the fetus was already dead when he performed the operation. This interpretation, which does have some social justification, "certainly represents a perversion of the historical intention underlying the abortion legislation which was passed for the protection of the unborn child and not

29. Severe and advanced degrees of cardio-vascular-renal disease in pregnancy; some other serious cases of cardiac disease; an occasional case of disease of the primary urinary tract with renal decomposition constitute almost the total of cases on which there is still general medical agreement that the operation is needed for pressing medical reasons of a physical nature. WILLIAMS 167.

30. *Id.* at 171-72.

31. *Id.* at 172.

32. *Anderson v. Commonwealth*, 190 Va. 665, 58 S.E.2d 72 (1950); *State v. Cox*, 197 Wash. 67, 84 P.2d 357 (1938); *Wilbanks v. State*, 41 Ga. App. 268, 152 S.E. 619 (1930); *Commonwealth v. Nason*, 252 Mass. 545, 148 N.E. 110 (1925); *State v. Tippie*, 89 Ohio St. 35, 105 N.E. 75 (1913). See Annot., 16 A.L.R.2d 949 (1951).

as a form of control of unregistered medical practitioners.”³³ It is conceivable that under such an interpretation, a woman could be forced to carry a dead fetus for an extended period of time; a situation which may well have a lasting mental effect.

Eugenic Considerations

Current American legislation does not provide for abortion where the child is likely to suffer from a serious defect, either because of inheritance from one or both of his parents or because of some disease contracted by his mother during pregnancy. It seems, however, that the breeding of defectives is an evil and should be avoided if possible. In fact, even though they are “illegal,” such operations are regularly performed by responsible physicians throughout the country.³⁴ These doctors justify their eugenic abortions by stating that they are preventing the mother from developing a psychosis.³⁵ Typical cases where this is done (illegally) are where the mother contracts German measles (rubella) during the first twelve weeks of pregnancy, where the mother has deep X-ray treatments to which the fetus is exposed,³⁶ or where the child is likely to be born with a hereditary disease (*e.g.*, idiocy, insanity, epilepsy, nervous diseases, eye diseases leading to blindness).³⁷ In the first instance, thirty per cent of the offspring are born with serious abnormalities; in the second, two-thirds of the offspring can be expected to have gravely defective central nervous systems.³⁸ Not only would abortion in such cases relieve society’s burden and preclude a life of misery for the child, but the prospective birth of a seriously defective child may constitute a real threat to the mental and physical health of the mother.

Rape and Incest

It is difficult to see how a law can be supported that compels a girl to carry and give birth to a child conceived by her through an act of violence. Yet, that is the result of the present abortion law in the United States. It has been stated that:

33. WILLIAMS 191.

34. See Sontheimer, *Abortion in America Today*, Women’s Home Companion, Oct. 1955, p. 44.

35. Guttmacher, in THERAPEUTIC ABORTION 183 (Rosen ed. 1954) quoting Studdiford. He further states: “This is certainly an acceptable scientific rationalization for a socially necessary procedure.” *Ibid.*

36. MODEL PENAL CODE § 207.11, comment (Tent. Draft No. 9, 1959). (Hereinafter cited as MODEL CODE.)

37. TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 318 (1936).

38. MODEL CODE § 207.11.

There can be few doctors, and even members of the general public, who do not feel it an anomaly that pregnancies, the result of positively illegal acts — e.g. rape or seduction of a girl below the age of consent — cannot be terminated, if the demand is made, *upon that ground alone*.³⁹

Nevertheless, many instances of strict compliance with the law have been reported.

Dr. Fred L. Adair reported that a juvenile court judge sent him a young teen-ager, raped and pregnant, for an abortion. "I sent her back and said if he would give me legal permission, I would be very happy to do it. He said he could not do it. In other words, I could commit an illegal act and he could not."⁴⁰

Dr. M. S. Guttmacher tells of a twelve-year-old child who was impregnated by her father. After the latter had been convicted of the offense, Dr. Guttmacher told the youngster that, "Something will surely be done about it."⁴¹ Johns Hopkins Hospital agreed to perform the operation if a letter could be obtained from a judge authorizing the operation. Each judge approached expressed his concern *and* his inability to act. Guttmacher says, "The hurt look in the eyes of that spindly-legged child, when she was told that there was no help available to her, is a haunting memory."⁴²

It would seem doubtful that there would be any strong moral opposition to the aborting of a fetus conceived by forcible rape, and it is evident from the dearth of reported American prosecutions that abortion under these circumstances is not considered an anti-social act.⁴³ As for incest, this is usually committed upon adolescent girls, and the case here for abortion seems as strong as, if not stronger than, the case for abortion on other grounds, since there is some basis for believing that close inbreeding involves some chance of producing defective offspring. Furthermore, in the case of incestuous conception, there is no possibility that the offspring can be legitimized by marriage of the parents.⁴⁴

Social Grounds

As previously stated, social and/or economic considerations are never considered as grounds for justifiable abortion. However, these socioeconomic factors deserve consideration due to the fact that the majority

39. Letter from Chesser to the editors of BRITISH MEDICAL JOURNAL in 1 BRITISH MEDICAL JOURNAL 728 (1949).

40. As reported in Sontheimer, *Abortion in America Today*, Woman's Home Companion, Oct. 1955, p. 44.

41. Guttmacher, *The Legal Status of Therapeutic Abortion*, THERAPEUTIC ABORTION 185 (Rosen ed. 1954).

42. *Ibid.*

43. MODEL CODE § 207.11, comment at 154.

44. *Id.* at 155.

(estimated at ninety per cent) of all criminal abortions are performed on married women who seek to avoid the economic burden of another child.⁴⁵

Innumerable instances of such socioeconomic grounds can be set forth, *e.g.*, pregnancy of a deserted wife, pregnancy of a woman who is the working member of a family supporting a dependent husband or other children, pregnancy of a woman inmate of a prison,⁴⁶ none of which are sanctioned by the law.

INCIDENCE AND EFFECT OF CRIMINAL ABORTION

The clear result of the repressive abortion law in the United States has not been to eliminate abortion, but instead to drive it into the most undesirable channels, *i.e.*, (1) into the hands of professional abortionists, and (2) to lead women to resort to self-induced abortion attempts.⁴⁷ Estimates of the yearly number of abortions have been put as high as 2,000,000, of which the proportion of illegal abortions has been placed at anywhere from thirty per cent to seventy per cent.⁴⁸ A conservative estimate of the criminal abortions is 330,000 — roughly 1,000 per day.⁴⁹ More than half the illegal abortions are performed by physicians, one-fifth by midwives and about one-fourth by the mother.⁵⁰

A woman thwarted in her attempt to obtain a legal abortion will often turn to the abortionist who, more often than not, operates without medical training and under unsanitary conditions.⁵¹ These abortionists are widespread throughout the country, operating in various manners and catering to different classes of women.⁵² Some abortion rings are extremely well-organized, turning out a fantastic number of abortions per week.⁵³ Indeed, it has been stated that the abortionist is a necessary social institution, a theory supported by the number operating and in demand, and by the fact that many doctors refer women to known abortionists.⁵⁴

45. *Id.* at 149; TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED, ch. 23, 24 (1936).

46. MODEL CODE § 207.11, comment at 156.

47. WILLIAMS 212.

48. MODEL CODE § 207.11, comment at 147.

49. Sontheimer, *Abortion in America Today*, Woman's Home Companion, Oct. 1955, p. 44; WILLIAMS 209. John H. Amen has estimated that a total of more than 100,000 criminal abortions were performed in New York City alone during the three-year period 1936-39. *Ibid.*

50. TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 387-88 (1936).

51. Leavy, *Criminal Abortion: Facing the Facts*, 34 L.A. BAR BULL. 356 (1959).

52. For an analysis of criminal abortion in nine U.E. cities, see Sontheimer, *Abortion in America Today*, Woman's Home Companion, Oct. 1955, p. 44.

53. For an extensive discussion of the complete workings of an abortion system, see Bates, *The Abortion Mill: An Institutional Study*, 45 J. CRIM. L., C.&P.S. 157 (1954).

54. See account of Dr. Timanus in ABORTION IN THE UNITED STATES 62-63 (Calderone ed. 1958), describing twenty years of illegal abortion practice.

The appalling consequences of criminal and self-induced abortion are reflected in the number of deaths resulting from abortion in this country. It is estimated that attempted criminal abortions result in the death of between 5,000 and 10,000 women annually.⁵⁵ Assuming 8,000 deaths and 700,000 operations performed, this would make one death for each 87 abortions.⁵⁶ This figure may be compared with the position in Russia between 1920 and 1936, when abortion was legal and performed in hospitals by skilled physicians. It is said that the death rate was only one in ten thousand cases.⁵⁷ "The difference in the mortality rate would appear to be due primarily to the abortion laws, which prevent the operation being performed under proper conditions and by proper persons."⁵⁸ In both England and America therapeutic abortion performed by experts in hospitals is not an abnormal risk; but when it is performed by an unskilled abortionist, it not only can be gravely injurious to health but often causes death.⁵⁹

However, the law takes no heed of this waste of human life and health; in fact, it encourages it through its apathy in enforcing the repressive legislation in existence, and/or in not enacting a broader view toward legalized abortion. This is clearly reflected in the extremely low rate of prosecution and in the even lower rate of convictions of abortionists. In 1944 only one hundred sixteen persons were convicted for illegal abortions in the twenty-four states reporting on this.⁶⁰ The reason for this is clear. Women are reluctant to speak out, since they feel grateful to the person who relieved them of the unwanted burden, and such cases are seldom even detected unless serious illness or death results.⁶¹ The women themselves are almost never prosecuted since their testimony is needed to convict the professionals, and what jury would convict a woman under a law designed to protect her?⁶² Furthermore, police and authorities often allow known abortionists to practice since it is felt that

55. Leavy, *Criminal Abortion: Facing the Facts*, 34 L.A. BAR BULL. 357 (1959).

56. See WILLIAMS 213.

57. *Ibid.*

58. *Ibid.* Also see Kross, *Abortion Problems Seen in Criminal Courts*, National Comm. on Maternal Health, THE ABORTION PROBLEM 108 (1944), who states that the laws "have brought about a situation where abortions, instead of being performed in hospitals by competent physicians under aseptic conditions, are now performed by women themselves, by incompetent midwives, by doctors who even though they may be skilled, must operate with secrecy. . . ." *Ibid.*

59. WILLIAMS 213.

60. GEBHARD, POMEROY, MARTIN & CHRISTENSON, PREGNANCY, BIRTH AND ABORTION 192 (1958). Also see ABORTION IN THE UNITED STATES 36 (Calderone ed. 1958), which states that between 1946 and 1953 only 136 cases of abortion were prosecuted in New York County, "a small percentage of the abortions that obviously must occur in a county that had 411,413 births in the same seven year period." *Ibid.*

61. WILLIAMS 206-11.

62. *Id.* at 153.

there is a need for their services.⁶³ Therefore, a law is in force today that is disregarded by doctors and law enforcers, and which creates a vast social problem; in short, there is a widespread difference between our overt culture as expressed in our laws, and our covert culture as expressed by what people actually do and think.⁶⁴ As Dr. Taussig stated, he knew "of no other instance in history in which there has been such frank and universal disregard for a criminal law."⁶⁵

THE ARGUMENTS AGAINST A LIBERAL ABORTION LAW

The main factor accounting for laws against abortion is an ethical or religious objection. As the fetus develops, the greater portion of mankind develops a feeling of sympathy toward it, so that the subsequent destruction of it comes to be regarded by many as morally equivalent to murder.⁶⁶ Moreover, abortion is opposed by many on the ground that it is a violation of the divine command "to be fruitful and multiply."⁶⁷

On these religious grounds the Jewish scholars do not consider the present law too liberal, and more than likely would not oppose a broadening of the legal exception to the abortion statute.⁶⁸ Nor would Protestantism be opposed to some extension of the law.⁶⁹ However, the Roman Catholic view is firmly opposed to any form of abortion.

Catholicism proclaims that any direct attack upon the fetus is murder.⁷⁰ The historical reason for Catholic opposition to abortion is that it brings about death of the child without the benefit of baptism, thereby condemning it to eternal punishment.⁷¹ The modern view of the Catholic Church has been that the baby is a living entity at the moment of conception and that, therefore, a subsequent abortion destroys human life.⁷² A theory has been formulated, however, which might allow Catholic doctors and patients to reach the same results as non-Catholics. This is the doctrine of "double effect" (indirect killing) and is applied when there are both good and bad consequences resulting from a single act.⁷³ It simply means that if the actor intends the good consequence and the

63. GEBHARD, POMEROY, MARTIN & CHRISTENSON, *PREGNANCY, BIRTH AND ABORTION* 192 (1958).

64. *Ibid.*

65. TAUSSIG, *ABORTION, SPONTANEOUS AND INDUCED* 403 (1936).

66. MODEL CODE § 207.11 comment at 148.

67. *Ibid.*

68. Leavy, *Criminal Abortion: Facing the Facts*, 34 L.A. BAR BULL. 360 (1959).

69. *Ibid.*

70. For a complete discussion of the Catholic viewpoint, and an effective challenge of it, see WILLIAMS 192-206, 225-33.

71. *Id.* at 193.

72. *Id.* at 197.

73. *Id.* at 193, 200.

bad one results as an incident, the act is not considered sinful. For example, a physician could operate to remove a malignant ovarian tumor in a pregnant woman, and the indirect death of the fetus would be incidental.⁷⁴

When the operation can in some way be justified independently of the concept of abortion there is only an "indirect killing" of the fetus, but the doctrine can never apply where danger arises to the mother simply because of pregnancy.⁷⁵

This theory, however, is used very restrictively.

The viewpoint of a "killing" is usually answered thus: most abortion — spontaneous and induced — occurs prior to the fourth month of pregnancy. This is before the fetus has become firmly implanted in the womb, before it has taken on the recognizable features of humanity, and well before it is capable of any movement.⁷⁶ There seems to be a wide difference between terminating the development of such a being, whose chance of survival is still not definite, and the destroying of a viable fetus of eight months.⁷⁷ Furthermore, the repression of abortion has led to the performance of the operation by incompetents, leading to many deaths of the aborted women.

It should also be pointed out that the criminal law is imposed upon believers and non-believers as well, and should be enacted with a view toward humanity as a whole,⁷⁸ and not be governed by a theological attitude. Furthermore, the religious opinion assumes that we should always legislate morality, but many moral attitudes are disputable and narrow and should not be part of the law as applied to the whole of humanity.⁷⁹ The best solution seems to be:

Let any religious sect characterize abortion as a sin if it sees fit to do so, and punish its members for this sin by censure or other ecclesiastical punishment. But whether abortion is a crime is to be judged by worldly considerations. . . .⁸⁰

More clearly, if members of the Catholic faith do not desire to be aborted under the above circumstances, they need not be. However, the law should not be such that others are made criminals or are denied the relief of an abortion, when the public approves of a more liberal abortion law, simply because a certain group opposes the general view. The imposi-

74. Leavy, *Criminal Abortion: Facing the Facts*, 34 L.A. BAR BULL. 373 (1959).

75. *Ibid.*

76. MODEL CODE § 207.11, comment at 149.

77. *Ibid.*

78. WILLIAMS 229.

79. *Id.* at 232.

80. *Id.* at 233. Also see ABORTION IN THE UNITED STATES 148 (Calderone ed. 1958): Religious beliefs may be freely kept within the group, but cannot be imposed upon society, e.g., Mormon beliefs.

tion of the moral attitudes of one sect upon the general public is no more proper than would be a re-enactment of prohibition simply because some group opposes drinking.

Another argument against liberalization of the abortion laws is that it would be unjustified on medical grounds, *i.e.* that the abortion might leave bad effects (physical and psychological). However, even though it is conceded that the operation is undesirable in itself, it is to be regarded as the lesser evil under many circumstances.⁸¹ Furthermore, it is not the legislature's function to prescribe what is good for the patient; we are accorded liberty in respect to our own bodies, even the liberty to abuse them. No one would consider that the law should tell us to keep regular hours, etc., even though that would improve the health of many.⁸²

It is also argued that legalized abortion would lead to an underpopulation problem. This argument, if valid, would lead us to penalize not only abortion, but contraception, emigration, and the unmarried state.⁸³ Even if an adequate population is necessary, it must be shown that this cannot be achieved without recourse to the criminal law. Further, the argument certainly cannot be applied to unmarried women.

A statement often advanced is that a broader abortion law would be a condoning of illicit intercourse and an encouragement of promiscuity. This factor can hardly be a significant influence on the rate of illicit sexuality in a society where contraceptives offer reasonable assurance against the need for the unpleasant and expensive prospect of abortion.⁸⁴ If the argument be assumed valid, it would also require a prohibition of contraception, and even a ban on the cure of venereal disease — because fear of the disease is a potent check on promiscuity.⁸⁵ Moreover, this argument, if accepted, is correct only when applied to illegitimate pregnancies, and the abortion problem is not limited to this area. In fact, it is estimated that nine-tenths of criminal abortions occur among married women with three or more children.⁸⁶

CONCLUSION

As the abortion law exists today, its restrictive approach has had startling results. Patients, socially, medically, and humanely worthy, are denied relief. The medical profession is forced to circumvent the law. Criminal abortionists are operating openly.

These results, coupled with the weight of public opinion, which fa-

81. *Id.* at 222.

82. *Id.* at 223.

83. *Id.* at 224.

84. MODEL CODE § 207.11, comment at 148-49.

85. WILLIAMS 224.

86. *Id.* at 224-25.